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SUMMARY RECORD OF THE 637th MEETING

Held at Headquarters, New York,
on Wednesday, 3 June 1998 at 3 p.m.

Chairman: Mr. MAZILU (Romania)

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

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The meeting was called to order at 3.05 p.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (A/CN.9/444/Add.3) (continued)

1. The CHAIRMAN invited the Commission to resume its consideration of dra chapter II of the legislative guide on privately financed infrastructure projects (A/CN.9/444/Add.3).

Paragraphs 32-35

2. Ms. GIOIA (Italy) said that the provisions on transitional measures sh be universal in scope and should reflect as far as possible the economic realities of the different States.

3. Mr. RESTREPO-URIBE (Colombia) said that the transition from monopoly t market was a very complex process which had political, social and economic dimensions. While the issues involved were not strictly legal, they nevertheless had a significant impact on the legislative and regulatory framework that governed privately financed infrastructure projects. The recommendations should therefore include a reference to non-legal factors w might have a direct impact on the design, execution and operation of transitional measures.

4. Ms. FC JOT (France) said that while the guide was concerned with lega issues recommendations 4 and 5 attempted to inject a political dimension wh might more appropriately be addressed in the introduction to the guide. Whe State decided to execute a public infrastructure project, it had to make an economic choice, namely, whether to privatize the infrastructure or to reta control through a regulatory body or through contractual arrangements, such the build-operate-transfer (BOT) modality. It would not be appropriate, in view, for the legislative guide to concern itself with matters related to t economic structure of particular States.

Paragraphs 36-49

5. Mr. KHAN (United States of America), referring to paragraph 40, on the geographical division of residual monopolies, said that the rapid evolution technology and the constant search for gr-ater efficiency made the situation with regard to monopolistic sectors a very dynamic one. Monopolies that appeared to be entrenched in a given region on one day might no longer exist next day. In the absence of any discussion on the length of contracts, it s therefore be prudent to resist the temptation to define regional monopolies law.

6. Mr. LALLIOT (France) said that the selection procedures referred to in paragraphs 37 to 39 were based on the assumption that there should be competition. However, some legal systems provided for other procedures for selecting the beneficiary of a public contract which did not rely on competition. Under French law, for example, the c nclusion of a public servi delegation agreement was not subject to the competitive procedures that appl in the case of public contracts. Consequently, paragraphs 37 to 39 should

deleted or additional wording should be inserted to provide for non-competitive procedures for the award of infrastructure contracts. The terms used in the paragraphs in question, such as "bidding" ("appel d'offres") and "award" ("adjudication"), should therefore be changed to reflect the new and broader provisions.

7. Mr. GUISLAIN (Observer for the World Bank) said that the main point behind subsection 4 on controlling residual monopolies was merely to suggest to legislators various models for regulating the behaviour of public service monopolies and preventing abuses. The geographical division of residual monopolies was one such model.

8. Mr. MARADIAGA (Honduras) said that the use of the word "consortia" in paragraph 37 was questionable, since it appeared to imply that companies that were not part of a consortium might be excluded from the bidding process.

9. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the point raised by the representative of Honduras was one of terminology, which would be reviewed by the secretariat.

Paragraph 50

10. Mr. WALLACE (United States of America) drew attention to a slight difference in tone between the way in which the issue of competition was addressed in paragraph 50, on the conditions for the award of licences and concessions, and the way in which it was addressed in paragraphs 37 to 39 and in draft chapter III of the guide. Chapter III and paragraph 50 appeared to provide for some exceptions to the requirement for competition, while paragraphs 37 to 39 did not.

11. Mr. LALLIOT (France) said that, in striving for conciseness, the secretariat had included provisions from different legal systems that governed the award of licences to service providers. There was a need to be more specific and to clarify the differences between the various legal systems on the subject.

Paragraphs 51-61

12. Mr. LALLIOT (France) asked what connection there was between the paragraphs on price and profit regulation (paras. 55 to 61) and the rest of the draft legislative guide.

13. Mr. ESTRELLA FARIA (International Trade Law Branch) recalled that, at its thirtieth session, the Commission had suggested that the guide should include consideration of the issues of different market structures and price regulation. Indeed, the rate of return on investment was an issue of vital importance to the operational phase of a privately financed infrastructure project. Legislators had therefore opted for various price control systems, which were implemented by regulatory bodies established for that purpose.

14. Mr. LALLIOT (France) said that it might have been more appropriate to place the discussion of rates of return on investment in the section of the guide that

dealt with the operational phase of infrastructure projects and with the execution of contracts.

15. Mr. KHAN (United States of America) said that the provisions concerning price regulation all appeared to envisage a scenario in which a public utility had been privatized. There might, however, be a public/private partnership scenario in which the public entity was responsible for the management of the infrastructure project and the private sector entity for its financing. In such a scenario, therefore, the focus should be on cost recovery through proper operation and prudent spending. The subsection on price and profit regulation failed to contemplate the latter scenario.

16. Mr. RESTREPO-URIBE (Colombia) suggested that the word parameters ("parámetros") should be used instead of formulae ("fórmula o baremo") in the second sentence of paragraph 57.

Paragraphs 62-82

17. Mr. RENGER (Germany), referring to the comment by the United States delegation on the subject of coordinating the tone of the document, said that on that level he perceived a clash between recommendations 17 and 15: some of the aims of recommendation 17 could be perceived as political and therefore not in keeping with recommendation 15.

18. Mr. WALLACE (United States of America) reiterated that the Commission might consider moving the discussion of regulatory bodies to proposed chapter VII of the guide, entitled "Operational phase".

19. With reference to the paragraphs on the independence and autonomy of regulatory bodies (paras. 67 to 71), he said that independence and autonomy were two separate phenomena: the regulatory body must be independent from government ministries, whereas it must be autonomous relative to the bodies it regulated. The expression used in connection with the latter form of autonomy was that the regulatory body should not be "captured" by the industry it was regulating. Where capture occurred, so did the possibility of improper payments to regulators.

20. In paragraph 78, consumer protection should be added to the long list of responsibilities of regulatory bodies, specifically, the service provisions referred to in paragraph 62 should be incorporated in paragraph 78.

21. Mr. RESTREPO-URIBE (Colombia) said that in many cases regulatory bodies were municipal, local, departmental or regional authorities and thus operated on a territorial basis in a manner determined by the administrative system in a particular country. Their functions were therefore determined by the way responsibilities had been assigned to them, and they also often lacked the financial, administrative or technical resources to fulfil their functions or to plan, implement or supervise privately financed infrastructure projects, with a direct impact on those projects' success or failure. Those facts should be reflected in the guide, either in the paragraphs under discussion or elsewhere.

22. In connection with the previous speaker's point about consumer protection, it would be worth adding that consumer protection provisions not only should include a reference to the need to provide a minimum level of public service or ensure a minimum level of coverage for certain sectors of the public, but also had to do with the quality of service and the level of access for individual consumers.

23. Ms. MUSOLINO (Australia) said that the use of the word "technical" in the expression "technical grounds" referred to in recommendation 15 and paragraph 70 as being in opposition to political grounds was unfortunate in that, in an Australian context, a technical application of a rule could mean a narrow, literal application of that rule. She wondered if a rewording along the lines of the regulatory body's operating in "objective" or "substantive" application of the relevant laws might be more appropriate.

24. Mr. MORENO RUFFINELLI (Paraguay) supported the suggestion by the representative of the United States concerning the addition of consumer protection to the list of regulatory bodies' responsibilities: the issue was too important to be left ambiguous or unclear. In that connection, he referred to paragraph 15: to the ban on collusion, cartels, predatory pricing and other unfair trading practices should be added a duty of consumer protection.

25. Mr. OLIVENCIA RUIZ (Spain) reiterated that there must be clear terminology in the paragraphs under discussion as elsewhere to distinguish legislation from regulations, laws from rules: the distinction between high-level legislative provisions and lower-level regulations was not always clearly drawn in the text, and to use the word "regulate" or "regulatory body" in such circumstances was likely to cause confusion. It was important to keep clearly in mind the legislative provisions, on the one hand, and, on the other, the lower-level regulatory power regulatory bodies had which enabled them to put those legislative provisions into effect.

26. The title of subsection 3(a), "Range of institutional set-ups" should be amended to read "Institutional mechanisms", as found in the first sentence of paragraph 66.

27. Mr. CHOUKRI (Observer for Morocco) said that in the subsection on regulatory bodies there was too much, intimidating, emphasis on the powers of those bodies and the penalties they might exact for breaches and infringements, and nothing at all on the amicable settlement of disputes, on mediation or arbitration mechanisms, internal or otherwise, or on recourse to a higher authority with control over such regulatory bodies. That lack should be remedied, and the tone of the existing paragraphs should be made less harsh.

28. Mr. GUISLAIN (Observer for the World Bank) said that he agreed that arbitration mechanisms and the like were indeed very important. However, he believed that dispute settlement procedures were satisfactorily covered in the next subsection of the document, entitled "Regulatory process and procedures".

29. There was a broader issue of where in the guide regulation should be covered. He had a preference for dealing with it towards the beginning, rather than in chapter VII as suggested by the representative of the United States.

When a country adopted private funding as a mode of financing infrastructure projects, how the project was to be regulated once it was being implemented was actually one of the fundamental design parameters. He noted that in some countries the regulator had the power to award licences, i.e., "up front" and well before implementation of the project; also, as the institutional design formed part of the overall framework for any project, it was a key decision which governments needed to make before a project could begin or private investors could be attracted. For all those reasons, the issue of regulation should be dealt with at an early stage in the guide.

30. Mr. LAMBERTZ (Observer for Sweden) said that the point made by the representative of Spain concerning clear distinctions between laws and regulations was well taken; bearing in mind that the guide was intended to convey legislative recommendations, he found recommendations such as recommendation 19 out of place. The recommendation might be good advice, but its proper place might be either in the notes or in a more general kind of guide such as the United Nations Industrial Development Organization issued.

31. Mr. GUISLAIN (Observer for the World Bank) said that the World Bank's experience in a wide variety of countries showed the importance of embodying in law the key issues of how a sector was to be regulated, who would regulate it and the procedures for so doing, because investors needed reassurance about regulation at the outset.

32. On the point raised by the Observer for Sweden, he said that the composition of the regulatory body was usually specified in law, for the same reason as he had just put forward: to reassure the investor.

33. Mr. LIU Yang (China) pointed out that in paragraph 26 of document A/CN.9/444/Add.1 one definition of the term "regulatory body" was given. Paragraph 64 of the document under discussion, (A/CN.9/444/Add.3), contained another definition, one which he believed was too narrow. In connection with paragraph 67, he said that isolating regulatory bodies might be conceptually problematic, in view of their function, under the definition in paragraph 26 of document A/CN.9/444/Add.1.

34. Mr. ESTRELLA FARIA (International Trade Law Branch) confirmed that the previous speaker's understanding of the term "regulatory body" from paragraph 26 of document A/CN.9/444/Add.1 was the intended one. The sense given in paragraph 64 of document A/CN.9/444/Add.3 had not been intended to be narrower, and the secretariat would review the text for consistency of usage.

The meeting was suspended at 4.20 p.m. and resumed at 4.50 p.m.

Paragraphs 83-95

35. Mr. WALLACE (United States of America) suggested qualifying recommendation 23 in order to protect companies from having to provide regulatory bodies with proprietary or confidential business information that might be made public. Such exceptions were commonly granted in the regimes of many countries.

36. Mr. OLIVENCIA RUIZ (Spain), replying to the observers for Sweden and the World Bank, clarified that his delegation would have no objection to calling the draft a legislative guide if "law" and "legislation" were broadly defined. Naturally, it would be impossible to specify what constituted law, as opposed to regulations, in every system. If the term "legislative" was understood to mean all the written law of a legal system, the guide could include recommendations of a regulatory nature that applied to subsidiary regulatory bodies; however, particularly in the light of the Spanish equivalent of "legal provisions" contained in paragraph 64 ("las normas de rango legal"), a hierarchy of regulatory provisions must be established.

37. Ms. MUSOLINO (Australia) suggested that, in recommendation 25 and the related paragraph 95, the phrase "limit the causes that give ground to appeals" should be replaced by the phrase "limit the grounds for appeal".

38. Mr. LALLIOT (France) said that the word "appeal" in paragraphs 91, 95 and elsewhere should not be translated into French as "appel" but rather as "recours".

39. The CHAIRMAN invited Commission members to discuss the format of draft chapter II and the possibility of shifting portions of it to other addenda.

40. Mr. ESTRELLA FARIA (International Trade Law Branch) requested Commission members to give the secretariat clear guidance on how to restructure or amend chapter II. Suggestions thus far had dealt with moving portions of text on economic background to the introduction, devoting a separate chapter to the operational phase and toning down the language in certain places. Drafting suggestions and terminology corrections, such as the one just proposed by the representative of France, should also be provided directly to the secretariat.

41. Mr. TELL (France) proposed moving sections A and B of document A/CN.9/444/Add.3, which dealt with questions of political economy, to a non-normative portion of the draft guide, for example the introduction in document A/CN.9/444/Add.1. He stressed that even in the concession of public services or build-operate-transfer (BOT) arrangements, the underlying notion was that the State had a role to play.

42. Sections A and B of document A/CN.9/444/Add.3 should also be summarized and refined - he had already made that point in reference to paragraph 15 and others. A separate chapter might be devoted to the questions explored in section C. When draft chapter II was reorganized, a distinction should be drawn between various forms of State control, such as licences or authorization by regulatory bodies, on the one hand, and the contractual delegation of the management of public service or construction operations, such as concessions, on the other.

43. Ms. NIKANJAM (Islamic Republic of Iran) urged the Commission to call its draft "model legislation" rather than a "legislative guide". "Model legislation" was a more compelling title which would draw the attention of government authorities; guides tended to be relegated to legal advisers and lawyers. Her delegation was satisfied with the content of the draft but would agree to the shifting of certain portions in keeping with the wishes of other

Commission members. However, it strongly opposed deleting any chapters or paragraphs of the text.

44. Mr. WALLACE (United States of America) said that his delegation was not in favour of deleting any portion of the text either but agreed with the delegation of France that certain portions of draft chapter II should be moved. He suggested an introduction, informing countries that their lawmakers must take strategic decisions concerning economic governance, followed by an annex containing all of sections A and B and all of section C up to paragraph 82 on the budget of the regulatory body. The annex should deal with policy, law and regulation, regulation having the meaning of subsidiary legislation used by the representative of Spain. The annex would explain the strategic decision to be taken by legislators: whether to restrict the economic governance of their countries to policy alone or whether to embody it in laws and regulations. The operation of regulatory bodies, including questions of tariffs, consumer protection and safety, could be discussed in proposed chapter VII of the guide, on the operational phase.

45. Mr. ESTRELLA FARIA (International Trade Law Branch) expressed concern that the inclusion of an annex might create the impression that the Commission did not feel comfortable about adopting certain provisions within the body of the main text. Indeed, UNCITRAL had never adopted a text accompanied by such an annex.

46. Mr. WALLACE (United States of America) said that his delegation was not extremely concerned about the form of the final version of chapter II.

47. He agreed with previous speakers that the content of the middle part of, or annex to, the chapter differed from the usual subjects handled by the Commission. The annex, which would require further elaboration to provide a clearer distinction between the elements involved, should be followed by the text dealing with regulatory process.

48. Ms. ALLEN (United Kingdom) said that she shared the views expressed by the representatives of France and the United States. She noted that sections A and B of document A/CN.9/444/Add.3 covered rather sensitive areas of public law, and she agreed that section C, which differed greatly in character from the two previous sections, should be placed later in the guide.

49. Mr. GUISLAIN (Observer for the World Bank) said that the draft chapter under discussion was a complex and interesting multidisciplinary blend of public and private laws, and that it was intended to provide legislators with a comprehensive guide on private sector involvement. To a greater or lesser extent, the concepts reflected in the legislative recommendations already appeared in the domestic legislation of many countries which sought to maintain stability and reassure investors that the environment in which they operated would not change overnight.

50. It was advisable not to divide the text into increasingly smaller sections; it was sufficient to use sections A and B as an introduction, to be followed by a discussion of operations, in section C. Furthermore, section C would be incomplete without some prominence being given to the subject of regulation.

51. Mr. RESTREPO-URIBE (Colombia) said that the draft chapter had the merit of taking into account the direct relationship between the policy, economic, legal and subsidiary regulatory aspects of sector structure and regulation.

52. Mr. CHOUKRI (Observer for Morocco) said that his delegation supported the idea of preserving the unity of the chapter, and saw little need for annexes. However, the pursuit of coherence should not exclude the possibility of restructuring the text to enhance coordination between the various sections.

53. Mr. LALLIOT (France) said he agreed with the proposals made by the representative of the United States, and that there was indeed a strategic decision involved. He was fully aware that relegating certain paragraphs to an annex might raise the issue of the status of annexes.

54. It was immaterial whether the terms "law", "legislation", or "regulation" were used; what was most important was that there should be no doubt that the rules contained therein were mandatory. All contracting parties needed the reassurance of a stable legal regime that would not undermine investments.

55. The discussion of regulatory bodies and the whole of section C should be shifted to the end of the document, but in order to preserve the internal consistency of the document, the text should not be further subdivided.

56. He cited Colombian legislation in the telecommunications and transport industries which had established a system of licensing and regulation, as envisaged by the Commission.

57. There was room for improvement in the case of document A/CN.9/444/Add.3, but rather than deleting sections, it would be preferable to reorganize the material and insert the few missing points.

58. Ms. GUREYEVA (Russian Federation) suggested that if there were lingering doubts about the competence of the Commission to discuss economic problems in the current document, perhaps the advice of the Office of Legal Affairs could be sought.

59. She said that the Commission should not attach undue importance to the structure of the document under discussion, nor should it specify in which laws States should include provisions. Priority should be focused on producing a comprehensive document which would be understood by the end-user. She doubted whether striving to improve the document would bring the Commission closer to the desired objective.

60. Ms. GIOIA (Italy) said that the text should be amended by rearranging some parts and redrafting others. In both cases, the changes should take account of the function and purpose of the guide, namely, to offer suggestions on the rules intended to govern privately financed infrastructure transactions.

61. Mr. WALLACE (United States of America) endorsed the comments made by the representative of Italy.

62. He said that he agreed with France that it was not necessary to further subdivide the text; in that regard, his delegation was open to other solutions. Sections A and B should include legislative recommendations without going into details.

63. He reiterated the need to remind policy makers of the desirability of a strategic decision, by means of either a policy statement or legislation. Ideally, the introduction should draw the attention of the reader to the need for States to make strategic decisions on how they wished to proceed, and to consult the relevant parts of the document where applicable.

The meeting rose at 6 p.m.